NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JULY 25, 2003

FRANKLIN D. VIPPERMAN,
Plaintiff-Appellant,

v.

CARLOS CONCHA; JOHN COMPSTON; CHUCK GATES; JEFFREY JEANQUART; NEVADA, DIVISION OF PAROLE AND PROBATION,
Defendants-Appellees.

No. 03-15416
D.C. No.
CV-S-00-1355-RLH (RJJ)
MEMORANDUM

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding
Submitted July 21, 2003

Before: LEAVY, HAWKINS, and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Franklin Vipperman appeals the district court's dismissal of his civil rights action filed against the Nevada Division of Parole & Probation ("NDOPP") and four individual defendants. We have jurisdiction under 28 U.S.C. Section 1291, and we affirm.

Vipperman is currently on parole following a 1978 second-degree murder conviction. Vipperman's complaint asserts claims under 42 U.S.C. Sections 1983, 1985, and 1986 ("the civil rights statutes"), as well as 18 U.S.C. Section 1961-1968 ("RICO").

Vipperman's claims against the NDOPP and his monetary claims against the individual defendants sued in their official capacities are barred by the Eleventh Amendment. See Doe v. Lawrence Livermore Nat'l Lab., 131 F.3rd 836, 838 (9th. Cir. 1997) (addressing Section 1983); N.R.S. 41.031, 213.1071 - 213.1073.

As for the individual defendants sued in their individual capacities, Vipperman's first two sets of allegations challenge the NDOPP's parole decisions in 1981 and 1997. The civil rights statutes can provide Vipperman with no relief because the applicable statutes of limitations have expired.

The individual defendants are Carlos Choncha, John Compston, Chuck Gates, and Jeffrey Jeanquart.

See also Cerrato v. San Francisco Community College Dist., 26 F.3rd 968, 975 (9th. Cir. 1994) (addressing Sections 1985, 1986); Bair v. Krug, 853 F2d 672, 673-74 (9th. Cir. 1988) (addressing RICO).

Vipperman's third set of allegations also fails to state a claim. Vipperman cannot use the civil rights statutes to challenge the NDOPP's failure to modify his life sentence after he served ten years on parole. Vipperman's claim is barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), because success on the claim would necessarily imply the invalidity of Vipperman's current parole status.

Vipperman's forth set of factual allegations claim that parole officials have relied on false information when evaluating Vipperman's parole status. Vipperman contends that any document suggesting that Vipperman is responsible for the 1973 murder supporting his conviction is "false".

---

42 U.S.C. Section 1986 (providing for a one-year limit); McDougal v. County of Imperial, 942 F.2d 668, 673-74 (9th. Cir. 1991) (holding that actions under Section 1985 "are governed by the same statute of limitations as actions under Section 1983"); Perez v. Seevers, 869 F.2d 425, 426 (9th. Cir. 1989) (per curiam) (applying Nevada's two-year statute of limitations to a Section 1983 claim).

N.R.S. 176.003 provides, in relevant part:

> At any time after a prisoner has been released on parole and has served . . . 10 consecutive years on parole in the case of a prisoner sentenced to life imprisonment, the state board of parole commissioners, upon the recommendation of the division, may petition the court of original jurisdiction requesting a modification of sentence.

Vipperman's attempt to expunge from his files any documents indicating his responsibility for the murder supporting his conviction or challenging the use of these documents is barred by Heck. See Butterfield v. Bail, 120 F.3r 1023, 1024 (9th Cir. 1996). Vipperman's attempt to expunge information related to his 1997 parole violation hearing is barred by the relevant statutes of limitations. See supra at n.2.

Vipperman also asserts a RICCO theory against the individual defendants based on his four claims. None of Vipperman's claims can support relief under RICO, however, because Vipperman's alleged injuries do not involve "business or property," and his personal injuries are not compensable under RICO. See 18 U.S.C. Section 1964(c); Ove v. Gwinn, 264 F.3rd 817, 825 (9th. Cir. 2001).

We have reviewed Vipperman's other challenges to the district court's interlocutory decisions and find Vipperman's challenges to be without merit.

AFFIRMED.

FILED
Apr 17 10:36 AM' 01

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Plaintiff,

vs.

NEVADA DEPARTMENT OF PAROLE, AND PROBATION, et al.,

Defendants.

_____/

CV-S-00-1355 RLH(RJJ)

ORDER

(Motion to Dismiss #20)

Before the Court is **Defendant Nevada Department Of Parole and Probation's Motion to Dismiss** (#20 filed March 1, 2001). Defendant's Opposition (#26) was filed March 8, 2001, and Defendant filed its Reply (#29) on March 15, 2001.

On November 13, 2001, Plaintiff, Franklin Vipperman, filed a Civil Rights Complaint, in proper person, against Defendant Department of Parole and Probation and four individuals as defendants. Plaintiff's Complaint alleges civil rights violations under 42 U.S.C. Section 1983, violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970; and violation of Plaintiff's First, Fifth, Sixth, and Fourteenth Amendment rights.

Defendant filed this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), upon the ground that Plaintiff has failed to state a claim upon which relief may be granted.

Because the Court finds that Mr. Vipperman's claims against the Nevada Department of Parole and Probation are barred under the Eleventh Amendment, the Court will grant Defendant's Motion to Dismiss.

Background

Plaintiff, Franklin Vipperman, is currently on parole after serving a sentence of life imprisonment, with the possibility of parole, for his 1878 conviction of Second Degree Murder for shooting William "Frenchy" Parquette on April 20, 1973. Mr. Vipperman has always maintained that he is innocent, and alleges that he was framed, first by the "real" murder, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office, and Defendant Nevada Department of Parole and Probation.

Plaintiff's pro se complaint is conclusory and only vaguely describes facts in support of his four causes of action. Plaintiff's first cause of action alleges that Federal Judge Harry Claiborne, Plaintiff's former defense attorney, Judy Ahlstrom, Mr. Claiborne's secretary, and Nykki Kinsley, Executive Secretary of the Nevada Pardon and Parole Boards, and cousin of Judy Ahlstrom, conspired to keep Plaintiff in prison for the rest of his life. The precise conspiracy is unclear from Plaintiff's recitation of facts, because Plaintiff does not provide any specifics of dates of occurrences. Apparently, Plaintiff believes Judy Ahlstrom "illegally voicing her opinion." lied to the Nevada Parole Board during Plaintiff's second parole hearing, and convinced them to deny his request for parole, despite the fact that Plaintiff had submitted "hundreds of pages of Trial Transcripts which unequivocally proved and evidenced that the Plaintiff had in fact been framed for murder, and

---

The individual defendants have not been properly served and have not filed a responsive pleading in this action. Therefore, the Court does not reach the issue of whether the State's sovereign immunity shields the individually named defendants from liability for actions taken in their official capacities.

railroaded through the courts." Compl. At 7, lines 18-20. Plaintiff asserts this resulted in "Respondents arbitrarily, capriciously, illegally, and unconstitutionally keeping Plaintiff in prison for the following (7) years."Compl. At 8, lines 27-28.

Plaintiff's second cause of action alleges that he was brought before the Parole Board and "denied and deprived of all facets of minimum due process, and wilfully, wantonly, intentionally, and maliciously returned to Prison. For drinking." Compl. at 10, lines 16-18. Plaintiff does not allege any specific facts or dates regarding this incident, but seems to argue that the Parole Board denied him due process, because the Board has him returned to prison for drinking, a violation of parole, despite the fact that nine "good upstanding citizens" testified that he had never displayed a proclivity for violence while drunk or sober. Compl. at 10, lines 20-24.

In his third cause of action, Plaintiff asserts he was denied release from parole despite having presented to Defendant Chuck Gates "hundreds of Trial Transcripts, Documents, Court Records, Police Reports, Testimonies, Scene of the Crime and Autopsy Photographs, News Paper Articles, Parole Board Hearing Transcript, and numerous other documentary evidence, which unequivocally proved the Plaintiff had been framed for murder by Police and Prosecutors, railroaded through two different trials by trial judge, and sold out by his alleged defense attorney at trial, and on Appeals. And further kept in Prison through a conspiracy between the Parole Board, Police, Prosecutors, alleged Defense Attorneys, and Trial Judge." Compl. at 10-11. On May 1, 2000, Defendant Jeffrey Jeanquart allegedly informed Plaintiff that Carlos Choncha had denied Plaintiff's request for release from parole. Plaintiff further asserts that he was arbitrarily and capriciously removed

---

Plaintiff's claim is based on his apparent belief that after serving ten years of parole, he has the right to have his sentence changed from life to twenty years, so that he may be completely discharged from parole.

from minimum parole status and returned to maximum status, but does not allege any facts or surrounding circumstances. Plaintiff does not describe any action taken by the forth named defendant, John Compston, an employee of the Nevada Department of Parole and Probation.

In his fourth cause of action, Plaintiff alleges that "While acting in collusion and conspiracy with vindictive prosecutors, trial Judge, Police, and numerous Authorities of the Nevada State Prison System; the Defendant Nevada Department of Parole and Probation...have **solicited; and maliciously disseminated;** and filed in their records, known to them to be false, fabricated, perjurious, and otherwise harmful documents against the Plaintiff." Compl. at 12, lines 16-22 (emphasis in original). This claim appears to be based upon Plaintiff's repeated assertions that he was framed during his underlying murder conviction, and therefore, documents and records related to that conviction are false, and the Defendants "have further relied upon same to a constitutionally significant degree to deprive the Plaintiff of his liberty and freedom." Compl. at 12, lines 24-25.

Plaintiff asserts he is seeking injunctive and declaratory relief. However, Plaintiff does not elaborate any further upon the issue of relief.

Analysis

Defendants seek dismissal of Plaintiff's Complaint upon the grounds that: (1) Defendant is a state agency, and the state of Nevada has not waived its Eleventh Immunity from suit; (2) Plaintiff's claims fail as a matter of law; and (3) many of Plaintiff's allegations are barred by the statute of limitations.

Defendant brought its Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Because Defendant is immune from suit under the Eleventh Amendment, the Court finds dismissal appropriate pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, and declines to address Defendant's remaining arguments.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Const. Amend. XI

Under this Amendment, a state or its agencies may not be sued in federal court without its consent, see O'Connor v. State of Nevada, 686 F.2d 749, 750 (9th. Cir. 1982); see also U.S. Ecology Inc. v. State of Nev., Dept. of Human Resources, 557 F. Supp. 464 (D. Nev. 1983) citing Washoe Tribe of Nev. and Calif. v. Greenley, 674 F.2d 816, 818 (9th. Cir. 1982), unless Congress has exercised its power under Section 5 of the Fourteenth Amendment to override immunity. See Will. v. Mich. Dep't of Police, 491 U.S. 58, 66 (1989).

"Congress, in passing Section 1983, had no intention to disturb the States' Eleventh Amendment Immunity." Id. (quoted in Rounds v. Or. State Bd. Of Higher Educ., 166 F.3d 1032, 1035 (1999).

Thus, if the State of Nevada has not waived it's Eleventh Amendment immunity, this Court is barred from exercising federal question jurisdiction over the Defendant in this matter. Cf. Rounds, 166 F.3d at 1035-36.

Plaintiff cites Nevada Revised Statutes Section 41.031 as support for his assertion that the State of Nevada has waived immunity for suits against itself, its agencies and its subdivisions.

However, Nevada explicitly refused to waive its sovereign immunity under the Eleventh Amendment. See Nev. Rev. Stat. Section 41.031(3) (stating "The state of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States."); See also, O'Connor, 686 F.2d at 750.

Because the Court finds Defendant is shielded from liability by its Eleventh Amendment sovereign immunity, the Court must dismiss Plaintiff's cause of action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The Court declines to reach the merits of Defendant's alternative arguments in favor of dismissal.

Accordingly, for good cause appearing, IT IS HEREBY ORDERED that Defendant Nevada Department Of Parole and Probation's Motion to Dismiss (#20) is GRANTED.

Dated: April 16, 2001.

"s/ Roger L. Hunt".
ROGER L. HUNT
U.S. District Judge

C-1

FILED
Dec 19, 2:44 PM 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Plaintiff, No. CV-S-00-1355-RLH

vs. **ORDER**

NEVADA DEPARTMENT OF (Motion to Dismiss #52 & 55)
PAROLE AND PROBATION,
et al.,

Defendants.
_____/

Before the Court is Defendant Concha's **Motion to Dismiss** (52), filed October 31, 2002, and Defendants Compston and Jeanquart's **Motion to Dismiss** (#55) filed November 6, 2002. The Court has also considered Plaintiff's Oppositions (#54 and #56), filed November 6, 2002, and November 13, 2002, respectively, and Defendant's consolidated Reply (#57), filed November 19, 2002.

BACKGROUND

On November 13, 2001, Plaintiff, Franklin Vipperman, filed a Civil Rights Complaint, in proper person, against Defendant Department of Parole and Probation and four individuals as defendants. Plaintiff's Complaint alleges civil rights violations under 42 U.S.C. Section 1983, violation of the Racketeer Influenced and Corrupt Organization Act ("RICO") of 1970; and violation of Plaintiff's First, Fifth, Sixth, and Fourteenth Amendment rights.

The Court previously dismissed the Nevada Division of Parole and Probation. Order #35. The Court found that Plaintiff's claims against the Nevada Division of Parole and Probation were barred under the Eleventh Amendment; however, because the individual defendants had not at that time been properly served and therefore, had not filed responsive pleadings in this action, the Court did not reach the issue of whether the State's sovereign immunity shields the individually named defendants from liability for actions taken in their official capacities. Defendants have been served and now file this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), upon the ground that Plaintiff has failed to state a claim which relief may be granted.

Plaintiff is currently on parole after serving a sentence of life imprisonment, with the possibility of parole, for his 1978 conviction of Second Degree Murder for shooting William "Frenchy" Parquette on April 20, 1973. Plaintiff has always maintained that he is innocent, and alleges that he was framed, first by the "real" murder, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office, and Defendant Nevada Department of Parole and Probation.

Plaintiff's pro se complaint is conclusory and only vaguely describes facts in support of his four causes of action. Plaintiff's first cause of action appears to assert that the Department of Parole and Probation conspired with certain individuals "to keep Plaintiff in prison for the rest of his life." Compl. at 7, 1.14. It appears that this allegation relates to a parole hearing held on July 29, 1981. Exhibits 17 and 18 attached to Complaint. The second claim challenges the decision not to "modify" Plaintiff's sentence after serving ten

---

Plaintiff's claim is based on his apparent belief that after serving ten years of parole, he has the right to have his sentence changed from life to twenty years, so that he may be completely discharged from parole.

(10) years of his parole and a parole violation charge filed August 8, 1997. Plaintiff's third claim also challenges the denial of Plaintiff's request to modify his sentence. Plaintiff's fourth claim, appears to assert that the Department's file, relating to the Plaintiff, contains false information. This claim appears to be based upon Plaintiff's repeated assertions that he was framed during his underlying murder conviction, and therefore, documents and records related to that conviction are false, and the Defendants "have further relied upon same to a constitutionally significant degree to deprive the Plaintiff of his liberty and freedom." Compl. at 12, lines 24-25.

DISCUSSION

Plaintiff asserts he is seeking injunctive and declaratory relief. Defendants seek dismissal of Plaintiff's Complaint upon the grounds that: (1) Plaintiff failed to timely serve the Summons and Complaint pursuant to Fed. R. Civ. P. 4; (2) Defendants are not subject to suit and are entitled to Eleventh Amendment immunity; (3) Plaintiff's claims fail as a matter of law; (3) Defendants are entitled to qualified immunity; and (4) many of Plaintiff's allegations are barred by the statute of limitations.

Motion to Dismiss Standard Under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475, 1481 (9th. Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in light most favorable to [p]laintiffs." Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th. Cir. 1999). Dismissal is appropriate

"only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th. Cir. 1988).

Statute of Limitations

Section 1983 claims are subject to a two (2) year statute of limitations in Nevada. Perez v. Seevers, 869 F.2d 425 (9th. Cir. 1989). Plaintiff's first and second causes of action take issue with hearings in 1981 and 1997. The parole hearing held on July 29, 1981, is beyond the applicable statute of limitations as well as the alleged parole violation charge of August 8, 1997. Exhibits 17 and 18 attached to Complaint, Complaint at p. 10, 1.2.

Defendants in their Official Capacity

Defendants are sued, in part, as state officials. A state is not a person for the purposes of 42 U.S.C. Section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Likewise, state employees acting in their official capacities are immune. Doe v. Lawerence Livermore Nat. Laboratory, 131 F.3d 836, 839 (9th. Cir. 1997). The same reasoning is applicable to 42 U.S.C. Sections 1985 and 1986. See Rode v. Dellarciprete, 317 F. Supp. 721 (M.D. Pa. 1985). Therefore, Defendants cannot be sued under these statutes in their official capacities.

Furthermore, Defendants cannot be sued in federal court in their official capacity unless there has been a waiver of the Eleventh Amendment. Congress did not abrogate the Eleventh Amendment when it enacted Section 1983, Rounds v. Oregon State Board of Higher Education, 166 F.3d 1032, 1053 (9th. Cir. 1999), and the state of Nevada has elected to maintain its Eleventh Amendment immunity. NRS 41.031(3). The same analysis is applicable to Sections 1985 and 1986. Therefore, Defendants are immune from suit on these claims in their

official capacities.

Plaintiff's Claims Fail as a Matter of Law

It is unclear whether Plaintiff is attempting to challenge his murder conviction, however, such a claim is improper under Section 1983. Edwards v. Balisok, 520 U.S. 341 (1997). The Supreme Court held that 42 U.S.C. Section 1983 cannot be used to assert allegations which would necessarily imply the invalidity of punishment imposed. See also Butterfield v. Bail, 120 F.3d 1023 (9th. Cir. 1997) (claim that false information was used in parole proceedings not cognizable under Section 1983). Plaintiff is also barred from challenging decisions of the parole board. Id. At 1024. (Allegation that false information was used to find inmate ineligible for parole necessarily implicates the validity of the denial of parole and, therefore, the inmate's continuing confinement). Additionally, Plaintiff has no right to a modification of his sentence as that is a discretionary act. NRS 176.033(2). The statute provides that the parole board "may" petition the court to modify the parolee's sentence and the court "may" grant the modification. Id. Therefore, Plaintiff cannot challenge the decision to deny his request for modification. See Neal v. Hargrave, 770 F. Supp. 553, 557-58 (D. Nev. 1991) (Plaintiff has no property right in discretionary work credits therefore cannot make a constitutional challenge). Finally, the Court is unsure of the exact nature of the fourth claim in the Complaint concerning alleged false information in the Department's file, however,

---

The statute provides in pertinent part:

> [after 10 consecutive years on prole from a life sentence] the state board of parole commissioners, upon the recommendation of the division, may petition the court of original jurisdiction requesting a modification of sentence... Upon hearing the recommendation of the state board of parole commissioners and good cause appearing, the court may modify the original sentence...

according to Butterfield, 120 F. 3d 1023, Plaintiff cannot contest his conviction therefore the "information" concerning his crime cannot be challenged in this action. Therefore, the fourth claim fails to allege any cognizable constitutional claim.

Finally, Section 1983 requires personal involvement for liability to attach. Ybarra v. Reno Thunderbird Mobile Home Village, 723 F. 2d 675, 680 (9th. Cir. 1984). Liability under Section 1983 requires: (1) personal involvement in the constitutional deprivation or (2) causal connection between a supervisor's wrongful conduct and the constitutional violation. Mackinney v. Nielsen, 69 F. 3d 1002, 1008 (9th. Cir. 1995). Plaintiff has not alleged any personal actions by the Defendants that could support a 1983 claim.

Plaintiff is also unable to allege claims under Sections 1985 or 1986. Section 1985(3) applies to conspiracies to violate Section 1983. Plaintiff also references Section 1985(2), however, fails to allege any facts that support a claim under this subsection. A complaint must specify the actual alleged conspiracy actions. See Karim-Phanhi v. LA Police Dep't, 839 F.2d 621, 626 (9th. Cir. 1988). Plaintiff's complaint fails to allege any conspiratorial actions by Defendants, and therefore, Plaintiff cannot proceed under Section 1985. Moreover, conspiracies to violate a plaintiff's constitutional rights fall under 42 U.S.C. 1985(3) which requires a class based, invidiously discriminatory animus. Bagley v. CMC Real Estate Corp., 923 F. 2d 758, 763 (9th. Cir. 1991). Section 1985(3) requires that "the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights." Gerritsen v. de la Madrid Hurado, 819 F.2d 1511, 1519 (9th. Cir. 1987). Plaintiff's complaint makes no allegation of a class-based animus to support a Section 1985(3) claim. Finally, a Section 1986 claim requires a valid Section 1985 claim. Malsh v. Garcia, 971 F. Supp. 133 (S.D.N.Y. 1997). As Plaintiff has not asserted a viable section 1985 claim, any

Section 1986 claim must also fail.

RICO

Plaintiff's oppositions contain brief references to the RICO statute apparently in reference to fees for supervised parole. Plaintiff's oppositions at p.6. The federal statute has been consistently interpreted to not apply to allegations of personal injuries. Oscar v. Students Coop. Assn., 965 F. 2d 783, 785 (9th. Cir. 1992). ("[I]t is clear that personal injuries are not compensable under RICO,"); Doe v. Roe, 958 F.2d 763, 767-78 (7th. Cir. 1992) ("terms 'business or property' are, of course words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom...all other courts construing this language have likewise concluded that a civil RICO action cannot be premised solely upon personal or emotional injuries.") RICO statutes are intended to combat organized crime and invasions of legitimate businesses, not to provide tort actions for personal injuries. Oscar, 965 F.2d at 786. Additionally, a RICO claim requires the existence of racketeering activity. This requires two (2) predicate acts in order to support a RICO claim. See Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th. Cir. 1991). Plaintiff fails to plead a valid RICO claim in his Complaint nor is one set forth in his opposition papers.

CONCLUSION

For the foregoing reasons the Court must dismiss Plaintiff's causes of action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motions to Dismiss (352 and #55) are GRANTED.

Dated: December 19, 2002.

"s/Roger L. Hunt"
ROGER L. HUNT
United States District Judge

C-8

FILED
NOV 23 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Petitioner,

JUDGMENT IN A CIVIL CASE

vs.

CV-S-00-1355 RLH (RJJ)

NEVADA DEPARTMENT OF PAROLE AND PROBATION et al.,

Respondents.
_____/

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered It's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision Has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss (#52 & #55) are granted. Judgment is entered for the defendants and against plaintiff Franklin D. Vipperman.

December 23, 2002

LANCE S. WILSON, CLERK
By:_____
Deputy Clerk

D-1

FILED
2003 FEB 21 AM 10:10

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Plaintiff,

vs.

Case No. CV-S-00-1355-RLH
ORDER
(Motion to Dismiss #62)

NEVADA DEPARTMENT OF PAROLE AND PROBATION, et al.,
Defendants.
_____/

Before the Court is Defendant Chuck Gate's **Motion to Dismiss** (#62), filed January 10, 2003. The Court has also considered Plaintiff's Oppositions (#64), filed January 16, 2003.

BACKGROUND

On November 13, 2001, Plaintiff, Franklin Vipperman, filed a Civil Rights Complaint, in proper person, against Defendant Department or Parole and Probation and four individuals as defendants. Plaintiff's Complaint alleges civil rights violations under 42 U.S.C. Section 1983, violation of Racketeer Influenced and Corrupt Organizations Act ("RICO") of 1970; and violations of Plaintiff's first, Fifth, Sixth and Fourteenth Amendment rights.

The Court previously dismissed the Nevada Division of Parole and Probation, Order #35, and three of the four

individual defendants, Concha, Compston, and Jeanquart, Order #59. Defendant Gates now files this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), upon the ground that Plaintiff has failed to state a claim upon which relief may be granted.

Plaintiff is currently on parole after serving a sentence of life imprisonment, with the possibility for parole, for his 1978 conviction of Second Degree Murder for shooting William "Frenchy" Parquette on April 20, 1973. Plaintiff has always maintained that he is innocent, and alleges that he was framed, first by the "real" murder, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office, and Defendant Nevada Department of Parole and Probation.

Plaintiff's pro se complaint is conclusory and only vaguely describes facts in support of his four causes of action. Plaintiff's first cause of action appears to assert that the Department of Parole and Probation conspired with certain individuals "to keep Plaintiff in prison for the rest of his life." Compl. at 7, 1.14. It appears that this allegation relates to a parole hearing held on July 29, 1981, Exhibits 17 and 18 attached to Complaint. The second claim also challenges the denial of Plaintiff's request to modify his sentence. Plaintiff's fourth claim, appears to assert that the Department's file, relating to the Plaintiff, contains false information. This claim appears to be based upon Plaintiff's repeated assertions that he was framed during his underlying murder conviction, and therefore, documents and records related to that conviction are false, and the Defendants "have further relied upon same to a constitutionally significant degree to deprive the Plaintiff of his liberty and freedom." Comp. At 12, lines 24-25.

Plaintiff's claim is based on his apparent belief that after serving ten years on parole, he has the right to have his sentence changed from life to twenty years, so that he may be completely discharged from parole.

DISCUSSION

Plaintiff asserts he is seeking injunctive and declaratory relief. Defendant seeks dismissal of Plaintiff's Complaint upon the grounds that: (1) Plaintiff failed to timely serve the Summons and Complaint pursuant to Fed. R. Civ. P. 4; (2) Plaintiff fails to state a claim upon which relief can be granted; and (3) Defendant, as a state officer, is not subject to suit under 42 U.S.C. Sections 1983, 1985, or 1986 and is entitled to Eleventh Amendment immunity with respect to official capacity suits.

Motion to Dismiss Standard Under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475, 1481 (9th. Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." Epstein v. Wash. Energy Co., 83 F3d 1136, 1140 (9th. Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th. Cir. 1988).

Service of Summons and Complaint Pursuant to Fed. R. Civ. P. 4(m)

Defendant argues that Rule 4(m) provides that service of the summons and complaint is to be accomplished within 120 days after filing the complaint. Fed. R. Civ. P. 4(m). Plaintiff filed his Complaint on November 13, 2000 and Defendant Gates was properly served on or about December 19, 2002, over two

years after the complaint was filed.

The Court notes that Plaintiff is pro se and was confused as to what constituted proper service on the individual Defendants. The Court granted Plaintiff an extension of time to carry out appropriate service with a warning that failure to do so in a timely manner would subject Plaintiff to dismissal for violating the time to serve the remaining Defendants with summons and complaint. Order 51. The Court finds that while Plaintiff's service on Defendant was late, the Court will consider the service proper.

Plaintiff's Claims Fail as a Matter of Law

It is unclear whether Plaintiff is attempting to challenge his murder conviction, however, such a claim is improper under Section 1983. Edwards v. Balisok, 520 U.S. 341 (1997). The Supreme Court held that 42 U.S.C. Section 1983 cannot be used to assert allegations which would necessarily imply the invalidity of punishment imposed. See also Butterfield v. Bail, 120 F.3d 1023 (9th. Cir. 1977) (claim that false information was used in parole proceeding not cognizable under Section 1983). Plaintiff is also barred from challenging decisions of the parole board. Id. At 1024. (Allegation that false information was used to find inmate ineligible for parole necessarily implicates the validity of the denial of parole and, therefore, the inmate's continuing confinement).

Additionally, Plaintiff has no right to a modification of his sentence as that is a discretionary act. NRS 176.033(2). The

---

The statute provides in pertinent part:

> [after 10 consecutive years on prole from a life sentence] the state board of parole commissioners, upon the recommendation of the division, may petition the court of original jurisdiction requesting a modification of sentence... Upon hearing the recommendation of the state board of parole commissioners and good cause appearing, the court may modify the original sentence...

statute provides that the parole board "may" petition the court to modify the parolee's sentence and the court "may" grant the modification. Id. Therefore, Plaintiff cannot challenge the decision to deny his request for modification. See Neal v. Hargrave, 770 F. Supp, 553m 557-58 (D. Nev. 1991) (Plaintiff has no property right in discretionary work credits therefore cannot make a constitutional challenge). Finally, the Court is unsure of the exact nature of the fourth claim in the Complaint concerning alleged false information in the Department's file, however, according to Butterfield, 120 F.3d at 1023, Plaintiff cannot contest his conviction therefore the "information" concerning his crime cannot be challenged in this action. Therefore, the fourth claim fails to allege any cognizable constitutional claim.

Finally, Section 1983 requires personal involvement for liability to attach. Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680 (9th. Cir. 1984). Liability under Section 1983 requires: (1) personal involvement in the constitutional deprivation of (2) causal connection between a supervisor's wrongful conduct and the constitutional violation. Mackinney v. Nielsen, 69 F.3d 1002, 1008 (9th. Cir. 1975).

Defendant is named in Plaintiff's third cause of action as the individual to whom Plaintiff presented "hundreds of trial transcripts, documents, court records, police reports, testimonies, scene of the crime and autopsy photographs, newspaper articles, parole board hearing transcripts, and numerous other documentary evidence." Complaint p. 11. Plaintiff explains that Defendant reviewed these materials in his presence and later the Defendant informed the Plaintiff over the telephone that "he had formulated the appropriate papers and forwarded them to the "higher ups" in Carson City requesting the Plaintiff's request for release from parole be granted." Complaint p. 11. Plaintiff has not alleged any personal actions by the Defendant that could support a 1983

claim.

Plaintiff is also unable to allege claims under Sections 1985 or 1986. Section 1985(3) applies to conspiracies to violate Section 1983. Plaintiff also references Section 1985(2), however, Plaintiff fails to allege any facts that support a claim under this subsection. A complaint must specify the actual alleged conspiracy actions. See Karim-Phanhi v. LA Police Dep't, 839 F.2d 621, 626 (9th. Cir. 1988). Plaintiff cannot proceed under Section 1985. Moreover, conspiracies to violate a plaintiff's constitutional rights fall under 42 U.S.C. 1985(3) which requires a class based, invidiously discriminatory animus. Bagley v. CMC Real Estate Corp., 923 F.2d 758, 763 (9th. Cir. 1991). Section 1985(3) requires that "the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights." Gerritsen v. de la Madrid Hurado, 819 F.2d 1511, 1519 (9th. Cir. 1987). Plaintiff's complaint makes no allegation of a class-based animus to support a Section 1985(3) claim. Finally, a Section 1986 claim requires a valid Section 1985 claim. Malsh v. Garcia, 971 F. Supp. 133 (S.D.N.Y. 1997). As Plaintiff has not asserted a viable section 1985 claim, any Section 1986 claim must also fail.

Defendant in his Official Capacity

Defendant is sued, in part, as a state official. A state is not a person for the purposes of 42 U.S.C. Section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Likewise, state employees acting in their official capacities are immune. Doe v. Lawerence Livermore Nat. Laboratory, 131 F.3d 836, 839 (9th. Cir. 1997). The same reasoning is applicable to 42 U.S.C. Sections 1985 and 1986. See Rode v. Dellarciprete, 317 F. Supp. 721 (M.D. Pa. 1985). Therefore, Defendant cannot be sued under these statutes in his official capacities.

Furthermore, Defendant cannot be sued in federal court in

his official capacity unless there has been a waiver of the Eleventh Amendment. Congress did not abrogate the Eleventh Amendment when it enacted Section 1983, Rounds v. Oregon State Board of Higher Education, 166 F.3d 1032, 1053 (9th. Cir. 1999), and the state of Nevada has elected to maintain its Eleventh Amendment immunity. NRS 41.031(3). The same analysis is applicable to Sections 1985 and 1986. Therefore, Defendant is immune from suit on these claims in his official capacities.

CONCLUSION

For the foregoing reasons the Court must dismiss Plaintiff's causes of action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant Gate's Motion to Dismiss (#62) is GRANTED.

Dated: February 20, 2002.

"s/Roger L. Hunt"
United States District Judge

D-8

FILED
FEB 24 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Petitioner,

vs.

NEVADA DEPARTMENT OF PAROLE AND PROBATION et al.,

Respondents.
_____/

JUDGMENT IN A CIVIL CASE

CV-S-00-1355 RLH (RJJ)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered
It's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision Has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss (#52 & #55) are granted. Judgment is entered for the defendants and against plaintiff Franklin D. Vipperman.

February 24, 2003

LANCE S. WILSON, CLERK
By:_____
Deputy Clerk